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In The

Supreme Court of the United States

AMERICAN ELECTRIC POWER FUEL SUPPLY, INC. AND INDIANA MICHIGAN POWER CO., INC., RIVER TRANSPORTATION DIVISION,

Petitioners,

v.

JAMES W. PERKINS AND JUDITH LYNN PERKINS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Respondent Perkins respectfully requests that this Court deny the petition for writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Sixth Circuit.

Respondent James Perkins – a 17-year veteran of the inland waterways with an exemplary record of safety – was permanently disabled when he fell from the coaming of a barge to the deck of the Petitioners' Ohio River towboat *M/V C.J. Bryan* as the result of an equipment malfunction aboard the barge. Mr. Perkins was working late at night on December 28, 1997 to secure an outside barge to the towboat by laying wire and tightening it with a ratchet fixed to the barge facing the front of the *M/V C.J. Bryan*, cranking it outboard (away from the center of the barge) with a "cheater bar" (fabricated pipe) slipped over the ratchet handle for added leverage. As Petitioner's expert admitted on the stand (App. 17 at [462]), the ratchet malfunctioned when the dog of the ratchet slipped out of gear as the wire neared "bar-tight." The cheater bar abruptly lost its resistance and Mr. Perkins was propelled forward. He lost his balance and fell over the edge of the barge. Though he teetered on the edge attempting to regain his balance, there was no safety chain, guard rail or deck of any kind, and Mr. Perkins fell onto the main deck of the *M/V C.J. Bryan*, almost 10 feet below, sustaining grievous injuries.

Respondent sued Petitioners, his employer, on January 21, 1998 in the United States District Court for the Southern District of Ohio based on negligence under the Jones Act, 46 U.S.C. § 688, and breach of the Petitioners'

duty to provide a seaworthy vessel under general admiralty law. After a three-day bench trial, the district court ruled against Respondent on all counts of his complaint on November 24, 1999. Respondent appealed the judgment to the United States Court of Appeals for the Sixth Circuit. The Court of Appeals reversed the district court's judgment under the Jones Act and general admiralty law on April 6, 2001 because of Petitioners' malfunctioning equipment and failure to provide adequate safety devices. Specifically, the court of appeals found that the district court's findings regarding adequate safety devices were unsupported by the evidence and concluded that Petitioners were liable under the Jones Act and general admiralty law. The court of appeals also concluded that a finding of the district court – the ratchet malfunctioned – demonstrated the vessel was unseaworthy as a matter of law. Finally, contrary to Petitioners' claim that the case was remanded for a determination of damages and "comparative negligence" (Petition at 11), the court of appeals reversed the district court's findings regarding the contributory negligence of Respondent as unsupported by the evidence and clearly erroneous and remanded only for a "hearing on the issue of damages to the extent necessary." Pet. App. A at 26a.

Petitioners seek writ of certiorari on two grounds: (1) that the court of appeals' decision conflicts with decisions of this Court and other appellate courts which limit the scope of review of factual findings; and (2) that the court of appeals' decision conflicts with decisions holding that vessel owners have no duty to provide an accident-proof vessel. However, the Petition fails to acknowledge that the court of appeals cited the proper standard of review,

reversed only factual findings it concluded were unsupported by the evidence, and independently held that Petitioners were liable as a matter of law based on the district court's findings, as entered. The Petition also fails to cite any specific legal standard applied by the court of appeals which conflicts with existing precedent of this Court, apart from its apparent view that *any* finding of liability would create this so-called conflict. Petitioners also fail to address how the court of appeals' decision conflicts with decisions of this Court such as *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 102 (1944) and *Seas Shipping Company v. Sieracki*, 328 U.S. 85, 94 (1946) which impose an absolute and nondelegable duty on the Petitioners to provide Respondent with a seaworthy vessel, and which hold that Petitioners' malfunctioning equipment render Petitioners liable as a matter of law.

The court of appeals' decision is fully consistent with nearly a century of decisions protecting the rights of seamen injured in the line of duty. Petitioners feign a conflict with vague references to standard of review and selective citation to basic admiralty principles, without identifying any actual or specific conflict regarding an important federal question. As such, Petitioners have presented no compelling reason to grant writ of certiorari and the petition should be denied.

ARGUMENT

I. PETITIONERS' STATEMENT OF THE CASE MISSTATES APPLICABLE LAW AND THE PROCEEDINGS BELOW.

A. Standard of Review.

Petitioners argue that the court of appeals impermissibly reversed findings of fact when there was evidence in the record to support them. Petition at 23. Petitioners flatly overlook that the court of appeals independently found the Petitioners liable as a matter of law under general admiralty law for malfunctioning equipment, based on the findings of the district court. Pet. App. A at 18a. Even if the court of appeals had not so found, the other grounds of liability are equally proper. The court of appeals found the district court's findings as to adequate safety devices clearly erroneous based on the entire evidence, a result which is fully supported by the relevant standard of review. "A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' " *McAllister v. United States*, 348 U.S. 19, 20 (1954), *modification denied*, 348 U.S. 957 (1955), *quoting United States v. Oregon State Medical Society*, 343 U.S. 326, 339 (1952) and *United States v. United States Gypsum*, 333 U.S. 364, 395, *rehearing denied*, 333 U.S. 869 (1948).

Indeed, the court of appeals reversed the district court on findings of fact only where it specifically found that the findings were unsupported by the evidence. This is squarely within the court's purview. "The function of the court is to decide whether the correct rule of law was

applied to the facts found; and whether there was substantial evidence . . . to support the findings made." *Commissioner v. Rankin*, 295 U.S. 123, 135 (1935).

> The appellate court . . . has the final responsibility for the facts as well as the law and findings of the District Court will not stand where . . . its findings of fact are contrary to the clear weight of the evidence.

The Seeandbee, 102 F.2d 577, 581 (6th Cir. 1939), *citing The Ernest H. Meyer*, 84 F.2d 496 (9th Cir.), *cert. denied*, 299 U.S. 600 (1936).

B. Proper Application of the Jones Act and the Doctrine of Unseaworthiness.

Petitioners argue restrictive application of the Jones Act and admiralty doctrines without citing nor acknowledging the fundamental principle that "[m]aritime law by inveterate tradition has made the ordinary seamen a member of a favored class." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 782 (1952). Thus, "remedial legislation [enacted] for the benefit and protection of seamen has been liberally construed to attain that end." *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 431 (1939).

1. The Jones Act.

It is under this liberal rubric that Petitioners' standard of care is measured. Moreover, the burden of proof for a seaman under the Jones Act is "very minimal and has been referred to as 'featherweight.' " *Caldwell v. Manhattan Tankers Corp.*, 618 F.2d 361, 363 (5th Cir. 1980);

Burden v. Evansville Materials, 840 F.2d 343, 346 (6th Cir. 1988). Petitioners argue that the court of appeals "misapprehended" the standard of care with reference to "imprecise and inapplicable judicial opinions" characterizing the standard of care as "slight negligence." Petition at 6. Petitioners argue "slight negligence" is really a reduced standard of causation afforded Jones Act cases, rather than a reduced standard of care. *Id.* Though it is unclear how such a distinction changes the outcome of the decision, it is clear that the court of appeals did not "misapprehend" the standard as accused by Petitioners because the court of appeals does not even use the term "slight negligence." In fact, the court of appeals cites to a reduced standard of causation, and indeed, quotes the very language chosen by this Court in *Ferguson v. Moore-McCormack*, 352 U.S. 521 (1957):

> [I]n suits under the Jones Act, the court must determine whether the evidence justifies the conclusion that the employer was negligent and that the employer's negligence played any part, however slight, in producing the injury to the seaman.

Pet. App. A at 8a (citations omitted).

Petitioners also argue that seamen are under a duty to use reasonable care for their own safety (Petition at 9-10), but fail to acknowledge that neither contributory negligence nor assumption of the risk is a defense to a Jones Act claim. *Imperial Oil v. Drlik*, 234 F.2d 4, 9 (6th Cir.), *cert. denied*, 352 U.S. 941 (1956). "A seaman does not assume the risk of injury even from obvious dangers. . . . " *The Seeandbee*, 102 F.2d at 581, *citing Cleveland Cliffs Iron Company v. Martini*, 96 F.2d 632 (6th Cir.), *cert.*

denied, 305 U.S. 605 (1938); *Mahnich*, 321 U.S. at 103; *Socony-Vacuum Oil*, 305 U.S. 424.[1]

2. The Unseaworthiness Doctrine.

While arguing that its duty under the Jones Act is not absolute (Petition at 7), Petitioners fail to recognize that their duty to provide a seaworthy vessel under general admiralty law is "absolute and completely independent of [Petitioners'] duty under the Jones Act to exercise reasonable care." *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549 (1960); *Mahnich*, 321 U.S. at 102; *Seas Shipping Co.*, 328 U.S. 85; *Carlisle Packing Company v. Sandanger*, 259 U.S. 255 (1922). In line with the "ancient characterization" of seamen as wards of the court,[2] admiralty law imposes a "strict liability" rule in which vessel owners are liable for any failure to provide a seaworthy ship, without regard to fault. *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 208 (1996), *quoting Seas Shipping Co.*, 328 U.S. at 94. "[T]he doctrine of seaworthiness imposes a heavy burden on ship owners, who are liable for the defective physical condition of their vessels regardless of fault." *California Home Brands, Inc. v. Ferreira*, 871 F.2d 830, 836 (9th Cir. 1989), *citing Flunker v. United States*, 528 F.2d 239, 242 (9th Cir. 1975).

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[1] Contributory negligence on the part of the seaman, however gross, merely moderates damages, rather than barring the claim. *Imperial Oil*, 234 F.2d at 9; *Schaeffer v. Michigan-Ohio Navigation Company*, 416 F.2d 217, 222 (6th Cir. 1969).

[2] *Isbrandtsen*, 343 U.S. at 783, *quoting Robertson v. Baldwin*, 165 U.S. 275, 287 (1897) and *Harden v. Gordon*, 11 Fed. Cas. 480, 485 (No. 6,047) (CC Me. 1823).

Moreover, while citing that it must have notice and an opportunity to correct before liability will attach under the Jones Act, Petitioners fail to acknowledge that notice is irrelevant to their duty to provide a seaworthy ship: "The ship owner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability." *Mitchell*, 362 U.S. at 549. It is well-settled under admiralty law that the failure of a piece of a ship's equipment – such as the malfunctioning ratchet in this case – renders the vessel unseaworthy *as a matter of law*, whether the cause of the failure is known or detectable by visual inspection. *Mahnich*, 321 U.S. at 103; *Seas Shipping Co.*, 328 U.S. at 94.[3]

The mere fact that a failure occurs is sufficient evidence to support a finding of unseaworthiness, even if the appurtenance fails because of a latent defect. *Norfleet v. Isthmian Lines, Inc.*, 355 F.2d 359, 361 (2d Cir. 1966).

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[3] Courts have repeatedly held that the failure of ship's equipment is sufficient to establish unseaworthiness, though the cause of the failure may be inexplicable. *Havens F/T Polar Mist*, 996 F.2d 215, 218 (9th Cir. 1993), *citing Viller's Seafood Company v. Vest*, 813 F.2d 339, 342 (11th Cir. 1987); *Greene v. Vantage Steamship Corp.*, 466 F.2d 159, 163 (4th Cir. 1972); *Oliveras v. American Export Isbrandtsen Lines, Inc.*, 431 F.2d 814 (2d Cir. 1970); *Gibbs v. Kiesel*, 382 F.2d 917, 919 (5th Cir. 1967); *Mills v. Mitsubishi Shipping Co.*, 358 F.2d 609, 612 (5th Cir. 1966), *cert. denied*, 386 U.S. 1036 (1967); *Vega v. The Steamship Malulah*, 291 F.2d 415, 419 (5th Cir. 1961); *Villarosa v. Massachusetts Trustees of Eastern Gas and Fuel Associates*, 39 F.R.D. 337, 339 (E.D. Pa. 1966); *Petition of Read*, 224 F. Supp. 241, 249 (S.D. Fla. 1963); *Wing v. Rothport Steamship Co.*, 30 F.R.D. 349, 351 (W.D. Mich. 1962).

C. Petitioners' Misstatements Regarding the Proceedings Below.

Petitioners incorrectly state that the court of appeals found "no legal error" and reversed only on errors in the district court's finding of facts. Petition at 11. Rather, the court of appeals found that the district court's legal conclusions were improper and that Respondent was entitled to recover under three independent grounds because the district court both rendered findings of fact unsupported by the evidence and misapplied admiralty law. Pet. App. A at 14a, 16a, 18a-19a. The court of appeals held that (1) the district court's findings regarding adequate safety precautions were unsupported by the evidence of record (Pet. App. A at 14a); (2) the entire evidence supported recovery under the Jones Act (Pet. App. A at 16a) *and* general admiralty law (Pet. App. A at 19a) for inadequate safety precautions; and (3) the district court's factual finding that the equipment used by the Petitioners malfunctioned (as proven by the testimony of Petitioners' own expert) rendered the vessel unseaworthy as a matter of law (Pet. App. A at 18a).

1. Inadequate Safety Precautions.

The district court found that the lack of installation of a safety chain or grab irons on the area of the barge from where Respondent fell did not render the vessel unsafe or unfit for service. Pet. App. A at 14a. The court of appeals held this finding was "unsupported by the evidence in the record" (*id.*) and that the district court ignored evidence that mandated a finding of liability on the part of

Petitioners (Pet. App. A at 16a, 19a). Petitioners incorrectly argue that this holding "misinterprets" the evidence and substitutes appellate judgment for that of the district court. Petition at 15-17.

Petitioners mistake their own crabbed interpretation of the facts for the factual record. First, Petitioners falsely state that the only expert testimony was that such devices are not practical, appropriate, or used in the industry. Petition at 16. Quite the opposite, the only testimony by Petitioners' expert regarding safety devices was that the size of the vessel would prohibit installation of a safety or rigging deck (App. 16-17) but that nothing prevents the installation of a *safety chain* on top of the tow knees (App. 18-19).

Second, Petitioners cite that there is "no evidence" to support Respondent's burden under this theory of liability. Petitioners fail to advise the Court that:

- Petitioners' safety manager testified that every other area of the boat where men were likely to work and prone to fall was guarded in some manner (App. 1-6);
- there is a safety chain installed at the *bottom* of the tow knees (testimony of safety manager, App. 6 at [46]-[47]); and
- other boats in Petitioners' own fleet have safety appliances of some kind between the tow knees[4] (testimony of safety manager,

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[4] No evidence suggests that there is any difference between these vessels which justifies requiring crewmen to work in a precarious and completely unguarded area high off the vessel's decks on some of Petitioners' vessels but not on others.

App. 6-7; Respondent, App. 12-13; and Petitioners' expert, App. 17).

Third, Petitioners state it is "particularly telling" that the court of appeals did not describe "what the safety devices would look like, how they would be implemented, or how they would have prevented Respondent's injury." Petition at 15. Though it is unclear of what this point is "telling" or why Petitioners expect the court of appeals' judges to be adept at naval architecture, this statement is an inaccurate characterization of the court of appeals' opinion. The court of appeals plainly described "safety chains or rails" (Pet. App. A at 15a) which are placed in several other areas of the vessel and on other vessels (*id.*; *see also* testimony of safety manager, App. 1-7). Moreover, the court of appeals correctly stated that the testimony at trial supported the conclusion that such chains or rails would have prevented the fall. Pet. App. A at 16a (*see* testimony of Respondent, App. 13 at [161], 14 at [180]).

Fourth, Petitioners argue that the court of appeals improperly found that Petitioners had knowledge of the need for such devices based on a fall from the same area of the vessel by another employee of Petitioners the month prior to Respondent's fall. Petitioners argue that this incident is distinct because that employee fell down the steps of the towknee instead of the gap between the towknees where the chain would be installed. Petition at 16-17. Petitioners' argument relies on their own interpretation of the evidence *outside* the record as the testimony cited makes no reference to the steps or that the area of the fall was different than that of Respondent's (Pet. App. F at 49a-50a). More importantly, such

argument ignores that the court of appeals found that Petitioners were liable for inadequate safety devices under both the Jones Act and general admiralty law. Under general admiralty law, Petitioners are liable for unseaworthy vessels without regard to its knowledge of the unseaworthy condition. *Mitchell*, 362 U.S. at 549.

Even had Petitioners established that a safety chain across the towknees was not industry practice, Petitioners also ignore the fact that it does not absolve them of liability for failing to provide Respondent a safe place to work. "It has long been held that determination of reasonable fitness is not limited by custom" particularly in view of the "awesome obligations of seaworthiness." *Webb v. Dresser Industries*, 536 F.2d 603, 607 (5th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977).

The court of appeals correctly found that the evidence supported a finding that the lack of adequate safety devices on the vessel imposed liability on Petitioners under both the Jones Act and general admiralty law.

2. Malfunctioning Ratchet.

The court of appeals held that the district court's finding that the ratchet malfunctioned made the vessel unseaworthy – and Petitioners liable – as a matter of law. Pet. App. A at 18a. Petitioners fail to recognize this inherently legal conclusion, and argue instead that the court of appeals "substituted its judgment" for the district court by not considering alleged evidence of Respondent's negligence and Petitioners' lack of knowledge of the defect.

Petition at 19. Petitioners' argument is defective on multiple grounds, being that (1) the court of appeals imposed liability on Petitioners based on a *legal conclusion* drawn from the district court's findings; (2) the district court did not make most of the findings urged by Petitioners; (3) there is no evidence of negligence on the part of Respondent or lack of knowledge on the part of Petitioners; and (4) even if there was, neither Respondent's negligence nor Petitioners' lack of knowledge bars a finding of unseaworthiness as a matter of law.

a. The Court of Appeals Made a Legal Conclusion From the District Court's Findings.

The district court found that the ratchet malfunctioned while in use by Respondent. Pet. App. A at 18a; Pet. App. D at 35a, ¶ 12. Such finding should not shock Petitioners as their own expert also testified that the ratchet malfunctioned. Pet. App. A at 18a. The district court, however, concluded that the vessel was not unseaworthy due to the malfunction because there was no evidence of a defective condition of the ratchet (which was never produced by Petitioners). Pet. App. D at 35a, ¶ 11. In contrast, the court of appeals held that the law required a finding of unseaworthiness based on the malfunction of the ratchet, without regard to whether there was evidence of the reason the ratchet malfunctioned. Pet. App. A at 18a. "Unseaworthiness is a **condition**, and how that condition came into being . . . is quite irrelevant to the owner's liability for personal injuries resulting from it." *Id.* at n.6, *quoting Ferrara v. A. & V. Fishing, Inc.*, 99 F.3d 449, 443 (1st Cir. 1996) (emphasis in original). "It

is well-settled law that even a temporary or unforeseeable failure of a piece of vessel equipment under proper and expected use is sufficient to establish unseaworthiness. . . . " *Id.* at 17a (citations omitted).

Having found the vessel unseaworthy, the court of appeals also found that the unseaworthy condition was the "substantial and direct cause of [Respondent's] injuries." Pet. App. A at 18a. This was also the finding of the district court, which found that Respondent lost his balance "as a result" of the malfunction. Pet. App. D at 35a, ¶ 12. As such, liability was imposed on Petitioners for Respondent's injuries under general admiralty law. Pet. App. A at 26a. Thus, contrary to Petitioners' argument, the court of appeals did not substitute its judgment for the district court on disputed facts, but properly reviewed the district court's conclusions of law *de novo* (*McAllister*, 348 U.S. at 20) and found them to be erroneous.

b. Petitioners' Claimed Evidence of Respondent's Negligence is Unsupported by the Record and Applicable Law.

Petitioners claim that Respondent should be liable for his own injuries, because they claim that Respondent was behaving negligently at the time Petitioners' equipment malfunctioned. Petition at A. Notwithstanding that these claims misrepresent the record, the court of appeals found that Petitioners' arguments were wrong as a matter of law. Pet. App. A at 19a-21a. The court of appeals correctly recognized that there is "no support in the law for the proposition that the violation of company policy

alone constitutes negligence." Pet. App. A at 21a. Moreover, Petitioners must establish not just negligence,[5] but negligence that actually *contributed* to his injuries. Even if both those hurdles are crossed, contributory negligence on the part of the seaman, however gross, merely mitigates damages, rather than bars the claim. *Imperial Oil*, 234 F.2d at 9; *Schaeffer*, 416 F.2d at 222. As shown below, however, Petitioners never presented any evidence to support a finding of contributory negligence on the part of Respondent.

Petitioners claim that the way Respondent was standing and tightening the ratchet violated company safety polices that were instituted because of the tendency for the ratchet to malfunction. Petition at 19-20. **There is no evidence to support this representation. Nor did the district court make any such finding.**

First, it is undisputed that Respondent was standing with his feet straddling the ratchet. The district court made no finding as to how Respondent's stance contributed to his fall, stating only *in dicta*, without explanation, that Respondent's stance was "likely" the sole proximate cause of his injuries. Pet. App. A at 4a, Pet. App. D at 40a, n.1. There was no evidence that anything about the stance resulted in lost balance by Respondent. Rather, both parties' experts testified that the wider stance used by Respondent actually provided him a more stable platform (Pet. App. A at 20a-21a; testimony of Petitioners' expert,

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[5] Courts temper this doctrine with recognition of the peculiar dangers attached to the work of a seaman. Momentary lapses of care by an ordinarily-careful worker do not constitute negligence in admiralty. *Bernard v. Maersk Lines, Ltd.*, 22 F.3d 903, 907 (9th Cir. 1994).

App. 17 at [482]; Respondent's expert, App. 15 at [289]). Contrary to Petitioners' statements, the testimony established that straddling ratchets was prohibited because of the risk from being lashed by a broken cable, *not* from a malfunctioning ratchet (testimony of Respondent's expert, App. 15 at [283]). The court of appeals correctly found the district court's findings as to contributory negligence to be "unsupported by the record and clearly erroneous." Pet. App. A at 20a.

Second, as to claims Respondent was pushing the cheater bar past vertical, the court of appeals rightly recognized that (1) "the district court did not draw such a conclusion;" (2) "there is no evidence to show that [Respondent] actually pushed the ratchet past vertical;" and (3) "In [Petitioners' videotape] exhibit, purporting to show the correct way of laying the wire, the deck hand there pushed the ratchet past vertical." Pet. App. A at 21a. Petitioners do not dispute that these are correct recitations of the evidence and the district court's findings. Rather, Petitioners again make the bald assertion (that was not well taken by either the district court or the court of appeals) that Respondent pushed the ratchet past vertical, though Respondent denies it (App. 13 at [174], 14-15 at [241]),[6] his supervisor who observed him

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[6] Petitioners unsuccessfully argued to the district court and court of appeals that this testimony is contradicted by Respondent's deposition testimony in which, Petitioners claim, Respondent said he did not know whether the bar was past vertical. To the contrary, Mr. Perkins testified he did not know where the cheater bar was when the ratchet failed. Petitioners' counsel did not ask Respondent whether he knew whether the cheater bar was past vertical.

performing the procedure up until seconds before the malfunction did not see him push the ratchet past vertical (App. 7-10 at [105]-[114]), and no other witness observed him doing so. Petitioners further make the unsupported statement that the company prohibits pushing the ratchet past vertical because of the tendency of the ratchet to malfunction, with citation to an irrelevant portion of the record that says no such thing. No evidence was presented that such rule, even if violated, was instituted because of the risk of falls from malfunctioning ratchets.[7] And Petitioners themselves presented evidence that Respondent's alleged conduct was consistent with accepted practice as Petitioners' own videotape, prepared and offered by Petitioners' expert, actually shows a deckhand both straddling a ratchet and pushing past vertical in demonstration of proper technique for using a ratchet.

Petitioners' contributory negligence claims point to no basis for review by this Court. Petitioners merely seek to re-argue its flawed interpretation of portions of the record that were never adopted by any court.

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[7] Petitioners also cite testimony that the procedure of tightening the ratchet can be performed safely. Petition at 19. Such testimony is irrelevant because, contrary to Petitioners' claims, it describes procedures employed by Petitioners' employees, including Respondent, when the equipment did not malfunction. There is no evidence, nor have Petitioners even suggested, that Respondent did anything to *cause* the ratchet to malfunction.

c. Petitioners' Claimed Evidence of Lack of Knowledge of a Defect in the Ratchet Is Irrelevant.

Petitioners argue that the testimony reflects that the type of ratchet used by Petitioners met industry standards, the malfunction at issue was common, and was not caused by a known defect. Petition at 20. Petitioners' argument, though factually unsound, is an apparent attempt to establish that Petitioners had no knowledge of a pre-existing defect. This argument, as the court of appeals found, is incorrect as a matter of law. The failure of ship's equipment establishes unseaworthiness without regard to the cause of the failure (*see supra* n.3). Moreover, actual or constructive knowledge is not a prerequisite to a seaworthiness claim: The shipowner is absolutely liable under the general admiralty law for even undetectable conditions which cause injury to its employees. *Mahnich*, 321 U.S. at 97, 103-104; *Seas Shipping Co.*, 328 U.S. at 87 n.1, 94. Of note, however, Petitioners' argument seems to establish quite the opposite – that they were on notice that this failure could occur.

Though its arguments are legally irrelevant, Respondent also notes that Petitioners have again misstated the record. There was no evidence the ratchet used by Mr. Perkins was identical to those used by the industry or was in perfect condition, as Petitioners were unable to produce the exact ratchet used. The only testimony was that visual inspection of the ratchet did not reveal a defect (testimony of Respondent, App. 13 at [171]; and testimony of Respondent's supervisor, App. 10-11 at [124]-[125]), just as the defects in *Mahnich* and *Seas Shipping* were undetectable by visual inspection. There is

certainly no evidence, as Petitioners claim, that the ratchet behaved as Respondent expected. The only witness that ever uttered the word "common" in relation to the dog slipping on a ratchet, Petitioners' expert, testified at the same time that this occurrence was a *malfunction* of the ratchet (App. 17 at [462]).[8]

II. REASONS FOR DENYING THE WRIT.

The writ should be denied because the court of appeals' decision is fully consistent with the holdings of this Court and other appellate courts, and was reached with proper use of its discretion under Rule 52(a), Fed. R. Civ. P.

In an attempt to create the appearance of a reviewable issue, Petitioners argue that the court of appeals' decision conflicts with (1) decisions of this Court and other appellate courts that the shipowner did not provide an accident-proof vessel; and (2) decisions of this Court and other appellate courts regarding review of factual findings. As explained briefly below, Petitioners' claimed conflicts do not bear out: The court of appeals made a legal finding that Petitioners were liable based on well-

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[8] Petitioners also make passing reference to a claimed failure by Respondent to introduce any evidence of a safer method of tightening the ratchet. Petition at 19. This is another resurrection of failed arguments by Petitioners, as it was not mentioned by either the district court or court of appeals. Petitioners cite no legal support for the proposition that Respondent must establish that a safer alternative could have been used, although it is certain that non-malfunctioning equipment would have been a safer alternative.

settled principles of admiralty law which Petitioners do not dispute in their Petition.

A. Petitioners Wrongly Claim a Conflict Exists with Decisions that Shipowners Need Not Provide An Accident-Proof Vessel.

Petitioners argue that the court of appeals' decision somehow imposes a duty to ensure accident-proof vessels in contradiction to this Court's precedent. Petition at 20. Quite the contrary, the court of appeals recognized that "a vessel need not be free from all possibility of mishap." Pet. App. A at 17a. By doggedly avoiding other well-settled principles of admiralty law, Petitioners' argument reduces to the proposition that any finding on behalf of an injured seaman would create this so-called conflict. What Petitioners do not call to the Court's attention is that the weight of the law, including the precedent of this Court, by far supports the court of appeals' decision on behalf of the seaman. Not only do Petitioners ignore that the seaman is a ward of this Court,[9] but they also ignore the repeated statements by this Court regarding the "settled canon of maritime jurisprudence that 'it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.' " *Daughenbaugh v. Bethlehem Steel Corp.*, 891 F.2d 1199, 1204 (6th Cir. 1989), *quoting American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 281-282 (1980); *accord Moragne v. State Marine Lines*, 398 U.S. 375, 387 (1970).

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[9] *E.g., Isbrandtsen Co.*, 343 U.S. at 782.

Moreover, while Petitioners claim the resulting finding of liability violates established precedent, they fail to identify any particular erroneous conclusion of law. The court of appeals found Petitioners liable under the doctrine of unseaworthiness because Respondent was injured as the result of the malfunction of Petitioners' equipment, based on decisions such as those in *Mahnich* and *Seas Shipping* that impose such liability under general admiralty law without regard to Petitioners' arguments regarding their knowledge of the defect. Petitioners make no claim that this legal conclusion is incorrect, and thereby rests the whole of their petition solely on their unsupportable contention that the court of appeals' conclusions regarding the factual findings were erroneous.

B. Petitioners Wrongly Claim a Conflict Exists with Decisions Regarding Review of Factual Findings.

Petitioners claim the court of appeals erred in reversing findings of fact because the findings were supported by "ample evidence at trial" and were choices between two permissible views of the evidence. Petition at 23. Petitioners' argument fails to present a proper issue for writ of certiorari.

First, Petitioners fail to recognize that, even if the court of appeals had not reversed a single factual finding of the district court, Petitioners would still be liable based on the court of appeals' legal conclusion that the undisputed malfunction of its equipment rendered the vessel unseaworthy under general admiralty law.

Second, Petitioners fail to acknowledge that the court of appeals did not set out an improper standard of

review. Instead, the court of appeals set out in the beginning of its analysis (consistent with Petitioners' arguments) that it "gives due regard to the district court's opportunity to judge the credibility of witnesses" and that such findings are clearly erroneous if "on the entire evidence [the court] is left with the definite and firm conviction that a mistake has been committed." Pet. App. A at 5a.

Finally, Petitioners do not correctly represent the nature of the court of appeals' review: It did not overturn findings based on the credibility of witnesses, but overturned findings not supported by any evidence. The court of appeals reversed two principal findings of the district court: (1) that the vessel was reasonably fit for service based on adequate safety devices; and (2) that the Respondent's stance was the sole proximate cause of his injuries. The first finding was reversed because, while the court of appeals agreed with the district court's factual predicate that safety devices were not required by regulation or industry practice, it found that the entire evidence supported that such devices were not inconsistent with custom and could have prevented the fall. Pet. App A at 15a-16a. This is squarely within *United States Gypsum*, one of the cornerstone cases in this arena, which holds that the court of appeals may look to the entire evidence even when "there is evidence to support" the district court's finding. 333 U.S. at 395. The second finding was reversed because the district court had stated *no factual predicate* for such a finding, and it was not otherwise supported by the evidence. The reversal of findings unsupported by the evidence is one of the primary functions of the appellate court. *Commissioner v. Rankin*, 295 U.S. 123, 135 (1935).

Thus, there were no factual findings which were reversed outside the scope of the appellate court's power pursuant to Rule 52(a), Fed. R. Civ. P.

In short, Petitioners have not demonstrated any basis for review on certiorari. The court of appeals' decision is consistent with nearly a century of jurisprudence by this Court establishing liability for damages suffered by seamen injured in the line of duty because of the failure of the ship's equipment. Moreover, the court of appeals properly applied this jurisprudence to the district court's findings of fact, while also setting aside those findings that were without support in the evidence. Because Petitioners argue that review is merited because a perceived conflict among the courts creates a question of "exceptional importance" and renders the decision of the court of appeals "erroneous" (Petition at 21-23), the complete absence of any conflict with any decision of this Court or other appellate court obviates the need for review on certiorari. The court of appeals properly reversed the district court, and this Court should permit its judgment to stand.

CONCLUSION

Respondent Perkins respectfully requests that this Court deny the petition for writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JAMES W. PERKINS,	:	
PLAINTIFF,	:	CIVIL 1-98-64
V.	:	
AMERICAN ELECTRIC POWER FUEL SUPPLY, INC., ET AL.,	:	
DEFENDANTS.	:	

TRIAL TO THE BENCH
VOLUME I

BEFORE THE HONORABLE SANDRA S. BECKWITH, UNITED STATES DISTRICT JUDGE, SITTING AT CINCINNATI, OHIO, ON MONDAY, SEPTEMBER 20, 1999.

* * *

[38] Q And on top of the pilot house there are located the speaker, loud speaker, radars, radio antennas and so forth?

A Yes, sir.

Q And there are men work up here occasionally; isn't that true?

A Yes, sir.

Q And around the pilot house there is a grab rail; isn't there?

A Yes, sir.

Q Go down to the next level. This is the pilot house roof level up here. The second deck from the top, if you will, this is the pilot house itself; is that true?

A Yes, sir.

Q Is it called the pilot house level or pilot house deck?

A Yes, sir.

Q And all the way around that deck there are men work there, aren't there?

A On occasion.

Q Have to wash the windows, chip paint, repaint, and so [39] forth?

A Yes, sir.

Q It's an ongoing thing, isn't it, the work on a boat?

A Some of it is.

Q Yes. And around this deck there are handrails or safety grab irons all the way around it; aren't there?

A Yes, sir.

Q And why are those there, sir?

A Why are they there?

Q Yes, sir.

A It is part of the safety "apertures" of the boat.

Q Okay. Do you, as the man in charge of safety at AEP, recognize there is a danger of falling from this level?

A Yes, sir.

Q Because there is crewmen working here?

A Yes, sir.

Q But go down to the next level, sir, this is called what level, please?

A That's the guest quarter deck.

Q Is it true that this area is probably how high off the main deck, sir?

A Twenty feet.

Q Is it true that this area is a place where work is conducted regularly on an ongoing basis to wash these windows, chip this paint, keep that boat in operation?

[40] A On occasion, yes, sir.

Q And men work here?

A Yes, sir.

Q Crewmen?

A Yes, sir.

Q And is it true that these grab irons or safety hand grab irons are all the way around this deck?

A Yes, sir.

Q Want to go down to the next deck with you, and that's called the Texas deck; isn't it, sir?

A Yes, sir.

Q The Texas deck is a deck where quite a bit of work goes on because it is so big on the stern end, isn't it?

A Yes, sir.

Q The Texas deck has men working regularly at this level?

A On occasion.

* * *

[42] Q On this level of the deck called the Texas deck, sir, there is men working there with ratchets?

A Yes, sir.

Q And there is a handrail all the way around that deck?

A Yes, sir.

Q And that's about, would you say, eight or nine feet off the main deck?

A Approximately, yes, sir.

Q Now, this level of the boat is about even with the top of the tow knees, isn't it, about the same level or height off the main deck?

A I would say that the tow – looking at the picture, the tow knees are maybe just a little bit higher.

Q Yes, just a little bit higher. Okay. And these handrails here on this deck are for the same purposes as they are on the ones above it?

A Yes, sir.

Q Crewmen may fall?

[43] A Yes, sir.

Q And these rails keep them from falling down onto the boat?

A They could.

Q Around the main deck, sir, are you familiar with the type of safety device that is installed all the way around that boat?

A We have safety chains.

Q And those safety chains must be in place for that boat to operate?

A Yes, sir.

Q If in fact a tow boat did not have these safety chains on the starboard, port, or stern on the main deck, you would not believe it fit to do its work, would you?

A Now, say that again, please?

Q Yes, sir. If these chains, these safety chains on the main deck were missing, you would not believe that boat should go out to work, would you?

A We would want to correct it and get them in place.

Q And the C. J. Bryan, throughout all the time we know of, has had these safety chains in place?

A Yes, sir.

* * *

[46] Q Are there any safety chains or safety guards on the bow of the boat, is my question.

A Yes, sir. Yes, sir, there are.

* * *

Q And between the tow knees there is one safety chain; isn't there?

A Yes.

* * *

Q All right. About three or three and a half feet off the main deck is a white safety chain; is that true?

A Yes, sir.

Q This is marked Exhibit – Plaintiff's 19-46. Does that show the safety chain on that tow knee fairly close up?

[47] A Yes, sir, it does.

Q You can see it hanging right here?

A Yes, sir.

* * *

[52] Q At the height of the tow knees there are handrails that come up actually above the tow knees?

A Yes, sir.

* * *

[55] Q But isn't it true that you do on some of your line haul vessels, or at least one, provide something

called a safety deck that covers this area between the tow knees in case people fall off empty barges?

A On our smaller vessels, yes, they have a working platform that extends out to the tow knees.

Q Yes, sir. And that working platform is at about tow knee level or a little under?

A It's below the top of the tow knee level, if I recall.

Q And that motor vessel is at least the Motor Vessel Safety [56] Leader, is it not?

* * *

Q Are there other boats that AEP operates in addition to the Safety Leader that maintains a safety deck up on the tow knee level of their line haul boat, any other boats?

A We have five 2,800-horsepower vessels that have that deck.

Q Would you state the name of those boats, please.

A The Motor Vessel Norman Snodgrass; the Motor Vessel Roger Keeney; the James Pinson, Motor Vessel Pinson; James Morehead.

* * *

[105] Q Tell me what – tell the Court, please, what you saw Wes Perkins doing.

A Well, I saw Wes Perkins and his deck man, the deck man at this point, Keith something, laying the – making the setup for the towing knee jockeys, commonly called, as you're [106] calling them, rock and roll wires,

yes, sir. I saw them lay the starboard wire first, which would be the right-hand side.

Q Yes, sir.

A Yes, sir. And, excuse me, I watched them go through the process, the method, which was monitoring, yes.

Q I see.

A Same on the port side. I monitored them laying the wire, the lay of the wire. No, sir, I wasn't on their back, I was just monitoring. It's an important factor.

And I saw Wes pick the ratchet up, spin it out, preparing it to use it, and did put it into service. And once he put it into service, which I mean – which I mean by service is tightening it, was good enough.

Q I am sorry, your last two words, please?

A Was good enough. Everything was routine, all in rhythm, yes, sir.

Q Suited you fine?

A Excuse me?

Q It suited you fine?

A Yes, sir.

Q And you're his supervisor?

A Yes, sir.

* * *

[108] Q Did Mr. Perkins do anything, after he started using the cheater pipe, that you thought at that time was unsafe?

A No, sir.

Q It looked okay to you?

A (Indicating.)

Q It looked okay to you as AEP's officer on that vessel?

A While I was looking at it, yes, sir.

Q Yes, sir. You saw nothing wrong.

A (Witness indicating affirmatively.)

Q And then I believe in your deposition you said you turned, or your attention was directed to something else?

A Yes, sir.

Q And what happened next, please tell the Court. Please [109] tell the Court what happened next, Captain.

A Next, when my attention was diverted from the – back there?

Q Yes. Yes.

A I heard – what happened next? I heard Wes Perkins hit the deck, and the cheater pipe.

* * *

[114] Q Yes. Did you see Wes Perkins tighten his ratchet with a cheater bar to the point to where his cheater bar was aimed down at the deck of the boat?

A No, sir.

Q Did you see him go past vertical much?

A No, sir.

* * *

[124] Q After Wes Perkins was removed from the vessel, Captain, did you make an investigation to determine what had happened or why he had fallen?

A Yes, sir.

Q Tell the Court your investigation and its results, please.

A Tell the Court?

Q Tell Her Honor.

[125] A The investigation?

Q Yes, sir.

A I investigated the equipment, the rigging, which in this case is the ratchets, the wires, what have you. It was usable, serviceable.

And I asked how it happened. I asked how it happened; they gave me the best of their knowledge.

* * *

Q Yes, sir. And there was nothing wrong with that ratchet; was there?

A No, sir.

Q Based on what you could observe, it looked fine?

A Serviceable.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JAMES W. PERKINS,	:	
PLAINTIFF,	:	
V.	:	CIVIL 1-98-64
AMERICAN ELECTRIC POWER FUEL SUPPLY, INC., ET AL.,	:	
DEFENDANTS.	:	

TRIAL TO THE BENCH
VOLUME II

BEFORE THE HONORABLE SANDRA S. BECKWITH, UNITED STATES DISTRICT JUDGE, SITTING AT CINCINNATI, OHIO, ON TUESDAY, SEPTEMBER 21, 1999.

* * *

[159] A Yes, sir, except the Safety Leader has a safety deck on it.

Q Have you seen the safety deck?

A Yes, sir.

Q Can you describe the safety deck for the Court, please.

A Yes, sir. It's made out of a corrugated steel. It's painted white, it has a red stripe, and it has a guard chain that goes across the handrail over to the other handrail.

Q Is that up on top of the tow knee?

A Top deck, on top the tow knee.

* * *

[161] Q Based on what happened to you, sir, and in your experience, would you tell the Court what it is that you believe, from what you saw, that AEP did that caused you to be hurt.

A I believe I went off balance tightening a ratchet, but my injuries were caused because there wasn't a safety chain there for me to grab, or a safety deck, so my fall was eight or nine feet instead of maybe no feet, or grabbing a safety chain.

* * *

[171] Q Stop there, please. Did you inspect your ratchet that night?

A Yes, sir.

Q Did you do it in the fashion he did?

A Yes, sir.

* * *

[174] Q That night, when you were working, did you go past that mark on toward the boat with your cheater pipe?

A No, sir.

* * *

[180] Q On the evening that you were injured, Mr. Perkins, are you able to tell, based on your work that night with that ratchet, if anything happened to the ratchet unusual?

A Yes, sir. The dog kicked out, threw me off balance, I went nine foot to the deck.

Q When you were off balance, did you try to regain your balance?

MR. POWERS: Objection, Your Honor.

THE COURT: Overruled. I will permit it.

THE WITNESS: Oh, yes. I tried to gain balance. I was reaching in the air for anything I could grab, and I had time to think about the fall that I was about to take.

BY MR. LAWRENCE:

Q Were you able to help yourself in gaining balance in any way?

A Just waiving my hands. I – I mean, I wasn't tumbling head over heels. I was standing up straight, but I was at the edge and went over.

* * *

[241] Q So you're going to come up with both hands?

A And before you get vertical, you're pushing out a little bit. If you want to turn your video on, I will show you how Bob Baldwin is doing it, pushing it.

Q Let's just take it a step at a time.

A I didn't go past vertical.

* * *

[283] Q What did you tell your students about straddling the ratchet?

Answer: It's against the safety rules.

Question: Why is it against the safety rules?

Answer: Well, it's common sense. If something comes loose, something breaks, you never want to be straddling a rope, straddling a wire, et cetera.

* * *

[289] Q Is there any other position that you know of that would [290] have been safer than straddling the ratchet on the job Mr. Perkins was assigned to do?

A That situation, your balance is – you're much more balanced if you do straddle the ratchet. You have very little room to work in.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JAMES W. PERKINS,	:	
PLAINTIFF,	:	
V.	:	CIVIL 1-98-064
AMERICAN ELECTRIC POWER FUEL SUPPLY, INC., ET AL.,	:	
DEFENDANTS.	:	

TRIAL TO THE BENCH
VOLUME IV

BEFORE THE HONORABLE SANDRA S. BECKWITH, UNITED STATES DISTRICT JUDGE, SITTING AT CINCINNATI, OHIO, ON THURSDAY, SEPTEMBER 23, 1999.

* * *

[428] Q Yes. Now, you testified about this safety deck being inappropriate for the Viking class vessel; is that true?

A I think it's – I forget the words I used, but, yes, it's inappropriate. It's unworkable.

Q And I want to ask you, sir, you said that because of the size of the boat, 2,000 tons, et cetera, that has something to do with it?

A Yes, the size of the boat, the dimensions, the deck fittings, the superstructure, there is several things that have something to do with it.

* * *

[462] Q Now, it is true, is it not, in this case, Mr. Perkins' case, this ratchet malfunctioned?

A I think that would be a fair statement. The dog slipped. It's a common malfunction, it's recognized in the industry, but, yeah, I think that's a fair statement, yes, sir.

Q And would you also agree with me that any examination that Mr. Perkins could have done that night in the normal use of the ratchet would not necessarily have prevented that malfunction?

A I can agree with that.

* * *

[482] Q Let me see if I have got it clear, because I am a little confused now. I thought I had it. If his legs are further apart, he is more stable in this maneuver that he was doing?

A That's a question?

Q Yes, sir. Is that true?

A I think it stands to reason, and I would agree with you that if your legs are further apart, you create a more stable platform.

* * *

[508] Q Captain Hammond, you can see from the photograph the name of the boat, true?

A Yes, it's the Safety Leader.

Q And you also can see the company that it works for?

A Yes, sir, AEP.

Q Yes. And see the gentleman standing out here?

A Yes, I do.

Q And also they have a wheel house?

A Yes, sir.

Q Railing, can you see the stands for the rails?

A Yes.

Q Also this is completely railed?

A Yes, sir.

Q This deck? And this deck all the way around, railing?

A Yes, sir.

* * *

[520] Q Could not be placed in an infinite number of places by simply providing the hooking places for it?

A The question is, is there any functional reason, any technical reason why it couldn't – you couldn't provide a hooking place to install that chain –

Q Yes.

A – in that photograph of that tow knee?

Q Yes.

A My answer is there is nothing that would prevent you from doing that.

Q And on up on the handrail?

A Nothing would prevent you from doing that.

Q So that the chain, the safety chain could be adjusted at whatever it's pushing, empty, part load, both, what's in front; safety chain becomes adjustable?

A From them eyelets?

Q Yes, sir.

A Yes.

Q And the C. J. Bryan has no such apparatus on its tow knees, does it, to allow for that variable hooking height?

A It does not.

* * *